No. 83-5701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JAMES ADAMS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioner, JAMES ADAMS, submits the following reply brief addressed to arguments first raised in the respondent's brief in opposition to the petition for writ of certiorari herein:

1. The first reason which Mr. Adams has tendered for granting certiorari in his case is

> TO DETERMINE THE PROPER ROLE OF THE PRESUMPTION OF ATTORNEY COMPETENCE IN THE ANALYSIS OF A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN A CAPITAL SENTENCING TRIAL, BECAUSE THAT PRESUMPTION IS BEING UTILIZED TO DENY CLAIMS OF INEFFECTIVE ASSISTANCE -- EVEN THOUGH DEFENSE COUNSEL PRESENTED NO MITIGATING EVIDENCE (DESPITE THE AVAILABILITY OF SUBSTANTIAL MITIGATING EVIDENCE) AND ARGUED IN EFFECT THAT DEATH WAS APPROPRIATE -- SOLELY FOR THE REASON THAT FORMER DEFENSE COUNSEL HAS NOT (OR WILL NOT) ADMIT A FAILURE TO INVESTIGATE OR OTHER DEFAULT IN HIS DUTY OF REPRESENTATION.

The brief in opposition has raised two arguments against granting certiorari for this reason which must be addressed.

(a) The brief in opposition asserts that petitioner did not present his argument concerning the presumption of attorney competence to the Eleventh Circuit. Accordingly, respondent argues, the Court should not now consider the merits of this argument. Respondent's position is flatly wrong, however. The argument respecting the role of this presumption in the analysis of a claim of ineffective assistance was presented

to the Eleventh Circuit in the briefs of the parties. In the briefs, respondent himself repeatedly relied on a presumption of attorney competence which, he argued, Mr. Adams' proof failed to rebut. At pages 7-8 of his reply brief, a copy of which is attached hereto as Appendix A, Mr. Adams responded to this argument and made clear to the court his position that there should be no presumption of attorney competence. He concluded,

> In short, there is not, as the State appears to believe, any presumption that a trial attorney's deficiencies are always the result of strategic considerations, rather than ignorance. Instead, that a legitimate basis for counsel's action and/or inaction exists is a matter which it is incumbent upon the State to show. Conversely, it cannot conceivably be the duty of a defendant to call a witness in order to elicit adverse and self-serving statements which the defendant disputes but is precluded from testing through cross-examination. Our adversary system of justice simply does not allow for such a Catch 22 situation. Consequently, Mr. Adams has established the ineffectiveness of the representation afforded him by trial counsel, and the State has totally failed to rebut this showing in any way, either below or before this Court.

Having presented this argument to the Court in his briefs, Mr. Adams was in no way obliged -- nor could he properly -- reargue the argument in his petition for rehearing when the court had so clearly rejected the argument in its analysis of his ineffective assistance claim. Nothing more could have been done to have presented the issue to the Eleventh Circuit.

(b) While Mr. Adams has urged the Court to grant certiorari on the presumption of attorney competence question because of conflicts among the circuits concerning the question, as well as its exceptional importance, he has not presented to the Court why the question must be resolved against any presumption of attorney competence in the event certiorari is granted. The respondent, nonetheless, has begun to address the merits, arguing that "logic would necessitate a presumption of competence." In brief reply, Mr. Adams submits that "logic" necessitates precisely the opposite -- that there be no such presumption indulged -- for the reasons articulated by Judge Arnold in his dissent in Stanley v. Zant, 697 F.2d 955, 974-975 (11th Cir.

1983), cert. pending, No. 82-7003, when he explained why there should be no presumption that trial counsel's actions were undertaken for tactical reasons:

> The question of trial counsel's strategy, or lack of it, is quite different. The lawyer himself is obviously the best witness on that subject, in many cases the only witness, but he is now in an adversary position vis-a-vis his former client. He may be unwilling to cooperate with present counsel. The very point of the proceeding is to challenge his professional conduct. He is much more likely to cooperate and consult with counsel for the State, whose object at the hearing will be to vindicate his conduct. It makes more sense, it seems to me, to put the burden of proof on the State, once a petitioner demonstrates some omission serious on its face, to call trial counsel as a witness to explain his or her reasons for what was done at the trial. "If in a given case the petitioner does not have access to the information necessary to sustain his burden of proof, the district court is of course free to make appropriate adjustments in the allocation of the burden." Washington v. Strickland, supra, at 1261 n. 31. Here, the State did not call trial counsel as a witness; its brief in this Court does not suggest what counsel's strategy was; we do not know what it was; and no court, state or federal, has ever found that counsel's conduct was the result of a strategic decision. In this situation, if I were free to do so, I should hold that counsel was constitutionally ineffective and that petitioner should have a new trial. He would not be released from prison. There would simply be a new trial as to punishment, and the worst that could happen, from the point of view of the State, would be a sentence of life imprisonment.
>
> Obviously my view of the proper allocation of the burden of proof is influenced in part by the fact that this is a death case. The more serious the consequences of a wrong decision, the more one wants to be careful to make the right one. That is what burden of proof is all about. Rules about presumptions and burdens of proof reflect one's views about where the risk of loss ought to be placed, and about what kinds of mistakes are more tolerable than others. Presumptions are not usually applied in favorem mortis. It is not a novel proposition that judgments inflicting the penalty of death should be hedged about with greater safeguards. The very existence of bifurcated trials in death cases proves that, if proof be needed. It may be true that the same legal principles govern ineffectiveness of counsel in capital as in non-capital cases; it is also true that the seriousness of the charges is a factor to be considered in assessing counsel's performance. Ante, at 962-963. It is not asking too much, when life is at stake, to require the State or counsel himself to explain a choice to present no evidence in mitigation.

2. The second reason which Mr. Adams has tendered for granting certiorari in his case is

> BECAUSE THE LOWER COURT'S APPROVAL OF THE FELONY MURDER AGGRAVATING CIRCUMSTANCE IN THIS CASE DIRECTLY CONFLICTS WITH THIS COURT'S RECENT PRONOUNCEMENTS IN ZANT V. STEPHENS CONCERNING THE NECESSARY FUNCTION OF STATUTORY AGGRAVATING CIRCUMSTANCES.

The brief in opposition asserts that this issue as well was not raised in the Eleventh Circuit and should, accordingly, not be reviewed by this Court. Again, respondent's assertion is flatly wrong. In his briefs before the Eleventh Circuit, Mr. Adams argued that the death penalty was disproportionate for one convicted, as he was, of "pure" felony murder (i.e., murder which is non-premeditated and committed without the actual intent to kill). Relying on Enmund v. Florida, ___U.S. ___, 102 S.Ct. 3368 (1982) and Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978), Mr. Adams argued that death was too severe a penalty for one who did not kill with the actual intent to kill. As part of this argument, Mr. Adams pointed out precisely what he argues here: that a death sentence which relies upon the underlying felony murder as an aggravating circumstance is arbitrary, because the same underlying fact is genuinely a mitigating circumstance -- yet Florida law permits it to be treated as an aggravating circumstance.

> Finally, Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) teaches that even mental factors which do not completely excuse criminal liability must be considered as relevant evidence on the issue of sentence in a capital case. Thus, even though the non-intentional nature of the killing in the instant case is not a legally sufficient excuse which would result in the total avoidance of culpability for a capital felony because of the felony murder theory of prosecution -- although it may well have been a complete defense had the State charged premeditated murder -- it is a matter which is properly considered in mitigation of the sentence. But what provides the mitigation in the present case also provides an aggravation: the underlying felony, as a matter of law. Once again, the sentencer is left without substantial guidance on the punishment issue, leading to that standardless and arbitrary sentencing process condemned in Furman v. Georgia, supra.

Brief for Petitioner-Appellant, at 33-34 (attached hereto, in relevant part, as Appendix B). Accordingly, the issue presented here -- that the use of "pure" felony murder as an aggravating

circumstance treats as aggravating a factor which is genuinely mitigating, resulting in an unreliable, arbitrary sentence determination -- was presented to the Eleventh Circuit, even though this Court's decision which brought this issue into focus, Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733 (1983), had not at that point been rendered.

3. The third reason which Mr. Adams has tendered for granting certiorari in his case is

> TO DETERMINE WHETHER FLORIDA'S HAPHAZARDLY APPLIED PROCEDURAL DEFAULT RULE CAN BAR FEDERAL HABEAS CORPUS REVIEW OF CAPITAL SENTENCING DECISIONS.

Respondent tries to minimize the significance of this issue by arguing that the Florida cases Mr. Adams relies on do not show a haphazard application of the procedural default rule. In particular, respondent argues that there was no procedural default in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Any reading of Straight or the other Florida cases relied on by Mr. Adams in his petition, however, shows that respondent misunderstands the plain language of these cases. Straight clearly involved a procedural default on the same mitigating circumstance instructional issue as that which Mr. Adams sought to have reviewed, for Straight not only raised the instructional issue on its merits, 422 So.2d at 831, he also claimed that his lawyer was ineffective for failing to raise this issue on appeal, 422 So.2d at 829-830 -- a procedural default in Florida. Accordingly, the opinion in Straight shows there was procedural default and that the procedural default did not bar review of the issue on its merits. The other Florida cases cited by Mr. Adams show that the Straight approach -- ignoring procedural default and reaching the merits -- is sometimes followed, and sometimes not, without any rational basis. Thus, the issue raised by Mr. Adams is unquestionably there -- despite the respondent's self-imposed blinders. And it is eminently worthy of review, a point which the respondent in no way contests.

FOR THESE REASONS, as well as those set forth in Mr. Adams' petition for writ of certiorari, the Court should grant certiorari.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier/mail to Honorable Sharon Lee Stedman, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401, this 29th day of December, 1983.

Richard H Burr, III
Of Counsel